United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLANT

ORIGINAL

76-7421

IN THE

United States Court of Appeals

For the Second Circuit

Docket No. 76-7421

ANTON PICINICH,

Plaintiff-Appellant,

against

CHRISTIAN HAALAND & BOISE-GRIFFIN STEAMSHIP COMPANY, INC.,

Defendants-Appellees.

SKIBS A/S SAMUEL BAKKE,

Defendant and Third-Party Plaintiff-Appellees,

against

JOHN W. McGRATH CORPORATION,

Third-Party Defendant-Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

APPELLANT'S BRIEF

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UNITED STATES COURT OF APPEALS
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Plaintiff,

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PRELIMINARY STATEMENT

At approximately 9:00 a.m. on July 12, 1971, the plaintiff longshoreman, Anton Picinich, suffered a serious accident aboard the defendant's vessel CONCORDIA VIKING, a dry cargo ship which was then discharging containers in Hoboken, New Jersey. Mr. Picinich fell some 35 feet from the top of a double-tiered container on the port-offshore side of the ship into the Hudson River. The fact of this accident is attested to by the stevedore third-party defendant's Report of Accident (Exhibit 8) (1N)*.

*Numbers in parentheses, unless otherwise indicated, refer to pages in the Appendix.

The plaintiff suffered injuries to his right and left shoulders, his lumbo-sacral and cervical spine. However, Mr. Picinich's greatest injuries were to his psyche. He is now nervous, withdrawn, and depressed. His former life style has been shattered. Mr. Picinich suffers from post-traumatic and chronic depression with anxiety, corroborated by the reports of third-party defendant's own examining physicians, Dr. Brown and Dr. Shapiro (Exhibits 2 and 3) (1C & 1G).

A jury trial was held before the Honorable Thomas F. Griesa, U.S.D.J., commencing on October 6, 1975, with the plaintiff alleging both negligence and unseaworthiness. The plaintiff testified that he fell while removing lashing lines from the top of an offshore container, which lines had been left there by the ship's crew. Mr. Picinich's uncontradicted testimony was that this offshore container moved while an adjacent inshore container was being lifted. The fact of this movement was substantiated by several eyewitnesses. Defendant shipowner spent much of its time at trial attempting to prove that the container in question could not possibly have moved. However, defendant could not produce a single witness who could state that, at the time of the accident, the container in fact did not move. Plaintiff's proof did not end with the establishment of movement. Plaintiff went further and showed that defendant did not employ available mechanical devices and procedures which could prevent lateral movement of the containers. In addition, the Injury Report (Exhibit 8) itself reflected that

an improper and unseaworthy method of unloading was being utilized at the time of the accident, to wit:

> "All foremen and hatch bosses have been instructed that no cargo operation shall start until all lashings on all deck cargo in vicinity have been removed." (1N).

We have here an undisputed maritime industrial accident, caused by a working surface which, by its movement, failed to perform its assigned task during the implementation of an admittedly improper method of discharge. This would appear to be a case which falls precisely within the spirit and the philosophy of Seas Shipping Co. v. Sieracki, 328 U.S. 85 (1945), and yet the jury returned a defendant's verdict. The plaintiff went uncompensated, we submit, because of clear and material errors in the Trial Court's charge, errors which went to the heart of the case and which substantially eliminated the vital distinction between negligence and unseaworthiness and specifically omitted several of the plaintiff's claims. A supplemental charge was delivered to the jury which then totally eradicated the distinction between negligence and unseaworthiness by instructing the jury that, on the facts of this case, there was no difference between the two theories of liability. Twenty minutes after this supplemental charge was delivered the defendant's verdict was in.

The errors in the charge were especially prejudicial in this case, where the defendant had emphasized that it was operating a dry cargo ship, not a container ship, and claimed that it should only be held to the customary practice prevailing on the former vessels. As will be pointed out below, however

relevant this may have been on the negligence claim, it had no proper bearing on the issue of unseaworthiness. Rodriguez v. Coastal Ship Corporation, 210 F.Supp.38 (S.D.N.Y. 1962).

Plaintiff's counsel excepted to all of the portions of the charge which will be detailed below. Subsequently, plaintiff moved for a new trial, initially on the grounds of defendant's failure to disclose certain documents in pre-trial proceedings. A hearing was held before Judge Griesa on January 28, 1976, after which counsel were told to submit further argument and position in affidavit form. In an affidavit dated February 24, 1976, plaintiff's counsel renewed his objections to the Court's charge for the reasons stated below.

A new trial was denied by Judge Griesa in an opinion dated July 26, 1976. As to the claimed errors in the charge, Judge Griesa merely stated that "plaintiff's objection to a portion of the charge reiterates a matter dealt with at the trial. I adhere to my ruling at that time."

ISSUES PRESENTED FOR REVIEW

1. Did the Trial Court err in its charge by defining unseaworthiness in terms of the elements of negligence?

2. Did the Trial Court err in its supplemental charge by directing the jury that, in this case, there was no difference between the theories of negligence and unseaworthiness, and in assuming the role of fact finder?

3. Did the Trial Court err in failing to charge the jury that unseaworthiness arises from the existence of an improper method of unloading cargo?

4. Did the Trial Court err in instructing as to "negligence" of the winch operator, as to which there was no evidence?

FACTUAL STATEMENT

The Accident

The CONCORDIA VIKING was a dry cargo ship owned by the defendant. She was not a container ship and had not been designed specifically for the purpose of carrying containers (62, 138-39, 265-66, 602-603, 759). Nonetheless, on May 28 and 29, 1971, 76 containers were loaded upon the deck at Damman, Saudi Arabia (502). Eight containers were loaded lengthwise to the line of the ship onto the port side of hatch number five. They were placed in two tiers of four each, each tier being two along and two across. The containers were 20 feet by 8 feet and weighed two tons each (513-16).

Edwin Vangsnes was the Chief Mate of the CONCORDIA VIKING during the time in question (499-500). He testified as to the manner in which the containers were stowed on the deck of the vessel, stating that wood chocking was placed between the bottom tier and the ship's rail on one side and the hatch coaming on the other (517-18). Wood dunnage was placed underneath the first tier of containers and between the first and second tiers (503-4, 517-18, 592-93, 601-2). However, William Langan, a foreman for the third-party defendant stevedore, testified that there was no dunnage between the first and second tiers when the vessel arrived in Hoboken (473).

Vangsnes further testified that wire lashings were used to secure the containers to the deck, but that these lashings

only extended from the deck to the top tier (103-4, 519-24).

The containers were of standard design and had holes in each of the four corners for the insertion of stacking devices (36). Plaintiff's expert, Captain William Chester Ash, described a stacking device as follows:

> "The stacking devices are when you want to make the container more than one high, it is a fitting that goes between the two containers on each corner that have points on the bottom and on the top so that when they are landed together they interlock. Those are the stacking fittings." (166).

Everyone agreed that stacking devices had not been employed on the CONCORDIA VIKING (35-36, 451, 591-92, 600).

There was also agreement that the use of stacking devices between the containers acted to prevent lateral movement or sliding. As Captain Ash described it:

> "Q. Now, Captain, what is the benefit with regard to safety in using these I.S.O. devices both when you lowered the containers and when you discharged the containers, taking into consideration that men have to work on them?
>
> "A. The most important factor is that you do not get an inadvertent movement of the box when you least expect it. It is going to stay there. If a passing ship creates a small roll, a small movement or if the cargo gear all on one side of the dock has two or three drafts all at the same time, may tilt the ship slightly. All of these factors are offset by the proper stacking devices. Your container won't move." (173).

It was also agreed that, unlike container ships, the CONCORDIA VIKING had no pre-set metal devices on the deck in which to fit the containers (138-39, 170, 591-92). Captain Ash described these deck fittings and their purpose as follows:

"Well, the deck fittings is something welded to the deck or welded to a rod that sits on the deck and is secured that will hold it rigid on the bottom. When the container is landed on the deck on all four corners, it sets on this fitting and it won't move forward or aft as long as it is welded down.

* * *

"Well, it makes an integrated solid unit that won't slide or wobble as long as the ship is stable. Even if it does wobble it will hold the unit together until it is lifted off those stacking fittings or deck fittings." (167).

Although it is hardly clear from the record precisely how the containers were lashed with metal wire on the voyage in question (519-23), one thing appeared to be true - the containers had been "package lashed" so that it was impossible to individually unlash the eight containers at hatch number five (282).

The CONCORDIA VIKING arrived at Hoboken on July 11, 1971 (539). On that day, the crew loosened the lashings that had secured the containers (539-45). At least in the vicinity of hatch number five, some of the lashings were still hanging loose from the containers on Monday, July 12, when the longshoremen arrived (141).

The plaintiff and his gang were assigned to discharge the containers in the vicinity of hatch number five (33). The gang boss was a Mr. Santoro (32). Four members of the gang, including Mr. Picinich, were told to discharge the containers on the port and offshore side of the hatch (34, 124-25). As mentioned above, there were eight containers here placed as previously described.

The plaintiff and his partner climbed up a ladder

placed against the inshore aft top container (36). Once atop the container, their "duty" was to place four hooks from the ship's boom on the container so that it could be lifted up and out (37). After the hooks were attached, the hatch boss Santoro instructed them to step to the adjacent offshore containers and throw off some loose lashings that remained there (41). The plaintiff moved onto the container immediately adjacent to the one already hooked up, and his co-worker moved to the offshore container immediately in front of the one which the plaintiff was on (41).

"Under supervision of the hatch boss" (Exhibit 8)(1N), the longshoreman operating the ship's boom began to lift the hooked-up container while the plaintiff and his co-worker were engaged in the throwing off of the loose lines (43). As the plaintiff told it, "when it reached the height of my container, when they cleared the space underneath, the container I was standing on slid in the empty space. . ." (43), and this precipitated his 35 foot fall to the water below. Mr. John Morich, a fellow longshoreman in Santoro's gang who witnessed the accident, also testified that the container on which the plaintiff was standing slid into the space previously occupied by the raised container, causing the plaintiff to fall into the water (129, 147-48).

There was general agreement that some contact had occurred between the inshore container and the offshore container during the lifting process. As the plaintiff put it:

"That container I was on before was pulled up slowly and I could hear it was scraping on my container I was standing on. And when it cleared, all of a sudden the container I was standing slid on the empty space." (93).

Mr. William Langan, a foreman for the stevedore and a witness to the accident, saw a container being lifted which hit another container, after which he saw a man go over the side (435). The Injury Report states that the inboard container "bumped" the outboard container. (1N). Captain Ash for the plaintiff and Captain William Wheeler for the defendant agreed that contact between the two containers was to be anticipated (245, 400-403, 416, 776), although Wheeler denied that a bump by a two ton container could precipitate movement of another two ton container (736, 745). Captain Ash was of the opinion that such contact would, indeed, precipitate movement if no stacking devices had been utilized between the first and second tier (245, 404).

Morich testified that the container on which the plaintiff had been standing slid in about five to six feet towards the center of the vessel (149). Langan stated that the container ended up "akimbo" (437-38). The Chief Mate Vangsnes said that he inspected the containers after the accident occurred and found them all to be in "proper position" (557).

As Anton Picinich described it, when he fell into the water "it felt like I hit a stone wall, like cement wall." (45). After he was pulled from the water he was "almost numb from pain" (47). While he was in the hospital "The pain was tremendous and I don't know where I was." (111).

For present purposes it is not necessary to detail

his injuries, but suffice it to say they were serious. After ten months he returned to work (52), but it was all downhill after that. As reported by the third-party defendant's examining physician, Dr. Gerald L. Winokur:

> "Since the injury patient has multiple complaints. He complains of almost constant rightsided headache with radiation to the occiput. He notes dizziness. He states he is nervous. He complains of inability and difficulty with sleep. He states his posterior neck region aches. His low back aches. His right hip aches. He notes aching in both shoulders and both legs." (Exhibit 1) (1B).

The plaintiff reiterated these complaints in his testimony (53). But the most significant residual has been the destruction of his personality. He is morose, withdrawn, and chronically depressed. Dr. Lawrence Edwin Apt reported on September 11, 1975 that Mr. Picinich was "highly anxious, tense, and considerably depressed", and felt that the prognosis was "guarded". (Exhibit 3)(1G). Mr. Picinich's own words are graphic:

> "When I come back from work I don't want to see anybody. Everybody and everything goes on my nerves, and those dizzy spells I can't get rid of them. And when I come from work I don't even want to eat. I just go to my bed." (53).

Plaintiff used to attend family gatherings, weddings, and christenings. He used to attend a social club. That is all gone now (52-54). Instead: "I wake almost every night very often. My body all shaking. Or I even lose consciousness. The last time I remember was sometime in March. I just fainted." (55).

The severity of plaintiff's post-traumatic response is corroborated by defendants' own doctors. Dr. Mortimer F. Shapiro stated that: "Psychiatric examination disclosed the presence of a mild to moderate degree of depression." (Exhibit 3) (1L).* And Dr. Fred Brown went even further. He was so impressed by the depth of the depression that he diagnosed a "depression reaction, schizoid type" and raised the possibility of contribution by organic brain damage (887).** In sum, Mr. Picinich is now a shell of the man he used to be.

Opposing Claims

The plaintiff's claims regarding liability have already been alluded to above. Contending all along that plaintiff had no burden to demonstrate the cause of the container's movement (21), but only needed to show that such movement rendered that container unfit for its assigned task as a working surface, plaintiff nonetheless introduced considerable evidence as to the reason for the movement. In the first place, Captain Ash contended that any ship carrying 76 cargo containers, as the CONCORDIA VIKING did on this voyage, should be outfitted like a container ship, notwithstanding the fact that it was designed as a dry cargo vessel, to wit:

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* "The depression is, I believe, a precipitate of the accident of July 12, 1971." (1M)

** Third party defendant refused to produce a copy of Dr. Brown's report (Exhibit 2) and it was unavailable when thisbrief was drafted However, a copy was obtained and is now included in the appendix (1C). The findings, we submit, are startling.

"It indicates to me that this is not the occasional picking up of a container. Such a quantity of containers would cover most of the available deck space on the ship and would call for the proper lashing gear for containers: quick release tensioners, quick release turn buckles, deck stacking plates and tier stacking plates." (397).

The stacking devices have already been described above (166). Captain Ash was of the definite opinion that the failure to use these devices between the first and second tier of the containers was a competent contributing factor to the movement of the container in question (226, 243). The use of dunnage between the containers, as was done on this voyage, increased the likelihood of slippage (226, 418). And Langan, the stevedore foreman, concurred in the opinion that stacking devices were necessary to insure against lateral movement (453).

Also as on container ships, plaintiff contended that the CONCORDIA VIKING should have been furnished with pre-set metal devices on the deck in which to fit the containers. Again, the nature of these fittings and their purpose has been described above (167). Captain Ash was of the opinion that the lack of these fittings enhanced the possibility of lateral movement (167, 171).

Plaintiff further claimed that the method of lashing employed on this voyage was improper in that the lashings only extended from the top tier to the deck (503-4,

519-24). Captain Ash made the following points. In order to insure stability, he stated that the bottom tier must be secured with lashings first (177). In addition, the top containers should have been secured with lashings running from their bottom corners to the deck (228). However, plaintiff's main objection to the lashing employed lay in the fact that it was the "package method". As Captain Ash testified, with the "package method", it was impossible to individually unlash the eight containers at hatch number five (282). Captain Ash was of the opinion that the CONCORDIA VIKING should have utilized the method customarily employed on container ships, to wit:

> "The method of lashing, the customary and accepted practice, is such that you do not have to let the whole mass adrift just to remove one container. You can knock off the lashings one at a time. And only the container that you are going to work on will be allowed to move. Then you move to the next one. You knock off the turn buckles or the tensioner clamps, the proper equipment, in a matter of seconds and you take the next one off. You don't turn the whole mass adrift because that is an invitation to a catastrophe." (231).

As mentioned above, plaintiff introduced evidence that, because of the lack of stacking devices, deck fittings, and proper individual lashings, lateral movement of the container upon which Mr. Picinich stood could have been precipitated by contact with the adjacent container (245, 404).

In addition, the stevedore foreman, Langan, stated that the vessel had an inshore list at the time of the accident (442-43). He attributed this to the fact that the Concordia ships are "tender", in that they have a tendency to list easily, for example, when heavy machinery is being moved about the vessel or the jumbo boom is swinging out over the side (444-45). Captain Ash elaborated further and described the inshore listing that takes place when the booms are swung over the side and three or four containers are proceeding off the ship towards the dock at the same time (406-7, 421-25).

Moreover, the plaintiff claimed that his injuries were also contributed to by the negligence of the defendant shipowner in failing to supervise the unloading operation (15, 16, 237-38). Further, plaintiff claimed that defendant shipowner was liable, solely under the unseaworthiness doctrine, because Mr. Picinich was injured by reason of an improper method of unloading. The improper method or plan is categorically identified by the contemporaneous Injury Report (Exhibit 8) (1N), and was further corroborated by Captain Ash who testified that the conducting of an unloading operation with respect to containers lacking stacking devices and individual lashings, with a man positioned on a container adjacent to the one being lifted off, constituted an "unsafe working condition" (245-56). As will be demonstrated below,

the law provides that such an unsafe method of unloading constitutes unseaworthiness, notwithstanding the fact that the method is conceived of and implemented by the longshoremen themselves. Plaintiff's counsel made this very point in his summation and "commended" the jury to the Trial Court's charge on this form of unseaworthiness (872-73), but unfortunately that charge never came. More on that later.

The defendant shipowner interposed two main defenses. In the first place, it contended that the CONCORDIA VIKING was a "stiff" ship, rather than a "tender" one (575). And in line with this, the argument was developed through Captain Wheeler that Mr. Picinich's container could not possibly have moved inshore, notwithstanding the fact that defendant could produce no eye witnesses to rebut the testimony as to actual movement, and also in full face of the well-established law that the plaintiff has no burden to demonstrate the cause of an unseaworthy condition. Captain Wheeler opined that he could "conceive of no force that could be anticipated to cause that container to move inshore." (745). Of course, as mentioned above, Captain Ash entirely disagreed. But again, notwithstanding the law on this subject, defendant's counsel argued extensively in summation that plaintiff could provide "no explanation" for the inshore movement (832).

However, the primary prong of the defense, and the one which underlies much of what this appeal is all about, was to the effect that the shipowner defendant followed the customary and usual practice on a dry cargo ship. Time and time again we heard from defendant's witnesses and counsel that the CONCORDIA VIKING was not a container ship, was merely a dry cargo ship which happened to be carrying containers, and that the manner of stowage employed on the vessel was in accordance with the "way it is always done" on dry cargo ships. For example, the Chief Mate Vangsnes testified as follows with respect to the use of dunnage between the tiers instead of stacking devices:

> "A. That is the way it's done on all cargo ships which don't have these devices on board.
>
> The Court: Which don't have what? I didn't hear you.
>
> The Witness: Devices, stacking devices on board." (603).

Earlier, Vangsnes said regarding the use of dunnage: "That is the way it always has been done on such a ship". (602). Wheeler testified that stacking devices are used on container ships, but not dry cargo ships (759). On cross examination, defendant's counsel developed testimony to the effect that the CONCORDIA VIKING was a dry cargo ship, and not a container ship (62), that most dry cargo ships have

no deck fittings for containers (138-39), that the CONCORDIA VIKING was not designed as a container ship (264), and that Captain Ash had served on dry cargo vessels which did not carry stacking devices (411). Further, with respect to the individual lashing system posed by Captain Ash, defendant's counsel developed an extensive cross-examination seeking to demonstrate that the necessary lashings could only be employed on container vessels with pre-measured and standard distances (254-66).

Distilled to its essence, defendant's argument was that the CONCORDIA VIKING did not "regularly carry containers" (171), and, therefore, was not obligated to employ the devices utilized on container vessels, but, rather, should be held to the standard customarily employed on dry cargo vessels which happen to carry containers. And as to this, Captain Wheeler testified that the system used aboard the CONCORDIA VIKING was a "good and proper and seamanlike way to transport these containers." (717).

Of course, plaintiff's response was that a vessel carrying seventy-six cargo containers, whether or not it is a dry cargo ship, should be rigged as a container vessel (396-97). If this entailed substantial structural modifications to the vessel, then so be it - in the name of safety the time and money should be spent (171, 265). But the jury might well

have felt that such modifications to a large dry cargo vessel were not necessary in the name of reasonable care. And, in fact, defendant's counsel planned on this and attempted, in summation, to portray Captain Ash's proposed modifications as an unreasonable burden on the industry (839-40). It is precisely because of the above-described testimony and this defense strategy that the proper distinction between negligence and unseaworthiness should have been emphasized in the charge. The jury should have been admonished that customary practice and reasonable care do not insure that a vessel is safe for its assigned purpose. Sadly, this was not done and, as will be pointed out below, the jury was explicitly told that no negligence equals no unseaworthiness. Thus, reasonable care became the equivalent of seaworthiness and a defendant's verdict became all but inevitable.

Point I

THE TRIAL COURT'S CHARGE MADE BASIC ERRORS AS TO THE NATURE OF THE UNSEAWORTHINESS REMEDY.

On the above facts, plaintiff submits that a very persuasive case had been made out for unseaworthiness on the basis of improper stowage. Usner v. Luckenbach Overseas Corp., 400 U.S. 494, 499 (1970); Venable v. A/S Det Forenede Dampskibsselskab, 399 F.2d 347, 353 (4th Cir. 1968); Reddick v.

McAllister Lighterage Line, 258 F.2d 297, 299 (2d Cir. 1958), cert. denied, 358 U.S. 908.

The fact of a maritime industrial accident was proven beyond reasonable doubt by the stevedore's Injury Report. If it is accepted that the container moved, and that the plaintiff fell because of such movement, unquestionably the container failed as a working surface. It cannot be denied that its use as a working surface was one of the "assigned tasks" of the container, inasmuch as the ship's crew had left the lashings on top and the Chief Mate had seen longshoremen work on top of containers "many times" (654). Thus, on good authority, the movement of Picinich's working surface was sufficient to constitute unseaworthiness. Van Carpals v. The S.S. American Harvester, 297 F.2d 9, 11 (2d Cir. 1961), cert. denied, 369 U.S. 865 (1962); Marshall v. Ove Skou Rederi A/S, 378 F.2d 193, 198 (5th Cir. 1967), cert. denied, 389 U.S. 828; Oliveras v. American Export Isbrandtsen Lines, Inc., 431 F.2d 814, 816 (2d Cir. 1970); Venable, supra.

The Van Carpals line of authority establishes the proposition that it was not incumbent upon plaintiff to demonstrate why his working surface had failed. Yet plaintiff did accomplish this, through Captain Ash and others, by showing that a lack of stacking devices, deck fittings, and individual lashings increased the likelihood of lateral movement. As pointed out above, such movement could have been precipitated

by a number of factors, such as contact with the adjacent container or listing. Of course, defendant took issue with most of the above, but the point is that plaintiff had made out his case for the jury on unseaworthiness.

As will be pointed out in detail below, customary practice on a dry cargo vessel might be germane to the negligence claim, but it is no answer to alleged unseaworthiness. Rodriguez v. Coastal Ship Corporation, 210 F.Supp.38, 43 (S.D.N.Y. 1962); In Re Read's Petition, 224 F.Supp.241, 247-49 (S.D.Fla. 1963). As Captain Ash noted, the CONCORDIA VIKING was, in effect, a container ship because of the number of containers carried on deck, and it should have carried the standard securing and safety gear found on such vessels (171, 396-97).

In any event, at the very least, plaintiff possessed a viable claim for unseaworthiness that deserved careful consideration by the jury. Plaintiff was deprived of this opportunity because of several major errors in the Trial Court's charge, which errors served to inform the jury that elements of notice and reasonable care must be established in order to make out a case for unseaworthiness. Of course, these elements properly belong in the negligence case, but it has long been clear that notice and reasonable care have nothing to do with unseaworthiness. Mitchell v. Trawler Racer, Inc., 362 U.S. 539,

549 (1960); Keen v. Overseas Tankship Corp., 194 F.2d 515, 517 (2d Cir. 1952), cert. denied, 343 U.S. 966.

The language of reasonableness and due care permeates the unseaworthiness portion of the Trial Court's charge. For instance, in describing plaintiff's claim that the vessel was unseaworthy because all of the "package lashings" had been turned loose at once, the Court stated:

> "You have heard the testimony of Captain Ash on redirect examination to the effect that crews called lashings crews of longshoremen could work with the other longshoremen in knocking off the lashings immediately prior to the container being raised. Then you have heard the testimony of Captain Wheeler for the defense, stating that lashing crews do no such work. This is part of the evidence which you should consider in determining whether it was unreasonable under all the circumstances for the lashings to be removed by the ship's crew on Sunday before the longshoremen commenced their work on Monday." (916) (Emphasis added).

Again, with regard to plaintiff's claim that the lack of stacking devices constituted unseaworthiness, the Court had the following to say:

> "You are entitled to consider whether when a ship is lying tied to a pier in calm water it is reasonable to trust in the weight of the containers and the weight of the top tier of containers placed on dunnage, if you believe dunnage was in place, to keep the containers from horizontal movement under reasonably foreseeable circumstances." (917) (Emphasis added).

The point is clear - the jury had no business considering whether it was "reasonable to remove the lashings" or whether it was "reasonable to trust in the weight of the containers" while dealing with the issue of unseaworthiness. This language describes reasonable actions and omissions, when the focus should be upon the end product of proper safety.

The same sort of error appears again quickly:

> "In other words, if you believe that the shipowner should have foreseen that under normal circumstances those containers would be insecure at the pier under the conditions we had here, in the absence of stacking devices, then it would be unseaworthy not to have them." (917) (Emphasis added).

The "foreseeability of insecurity" in this context describes nothing more than constructive notice of the defect. And notice is no part of the inquiry here. Foreseeability of some danger is often used to define an aspect of unreasonable conduct. There is no negligence unless the defendant foresees the risk that some harm may follow. Prosser, Law of Torts, Section 30, pp.119-123 (2d Ed. 1955). The sharp delineation between negligence and unseaworthiness in this respect is well known to the maritime bench and bar:

> "By its very definition, unseaworthiness excludes any requirements of foreseeability or notice. Consequently, any instruction that the injury must have been 'reasonably anticipated or foreseen' is reversible error." 9 Am Jur Trials, Section 80.

The same sort of error appears on the next page of the charge where, while still considering the claim of unseaworthiness, the Court stated:

> "The question here is whether there was a normal condition even though not perfect, but normal considering the nature of the work performed and whether it would be normal to expect the longshoremen to clean up and remove the few loose lashings by the ship's crew...." (918) (Emphasis added).

The case of DeLima v. Trinidad Corporation, 302 F.2d 585 (2d Cir. 1962) is directly in point. As this Honorable Court stated on that occasion:

> "The instructions to the jury for the most part indicated that unseaworthiness 'does not in any way depend upon negligence or fault or blame.' Nevertheless, when the trial judge sought to explain plaintiff's contentions as to the insufficient complement of wipers, he stated, 'As part of seaworthiness the vessel owner is due to use reasonable care and caution in furnishing a sufficient complement of crew members for the work of each seaman to be reasonably safely done by him.' In view of the 'complete divorcement of unseaworthiness liability from concepts of negligence.' Mitchell v. Trawler Racer, Inc., 362 U.S. 539, 550, 80 S.Ct. 926, 4 L.Ed.2d 941 (1960), this statement was error." (302 F.2d at 587) (Emphasis added).

Lest the defendant here complain that other parts of the charge were correct on the issue of unseaworthiness, DeLima again provides the answer:

"Defendant contends, however, it was harmless error since other parts of the charge stated the law correctly. We do not agree. The challenged statement was not equivocal or subject to differing interpretations which might be clarified by other portions of the charge. We cannot assume the jury disregarded it. At best, it was likely to leave the jury highly confused, that alone being grounds for reversal." (302 F.2d at 587) (Emphasis added).

Plaintiff's counsel herein specifically excepted to these portions of the charge on the authority of the DeLima case (935).

A similar error was commited by the Court in its excessive use of the terms "reasonableness", and related terms, especially in the negative sense. As plaintiff's counsel put it, "You have permeated the unseaworthiness claim with reasonableness language that violates the DeLima case in this Circuit." (935). This type of error was confronted in the case of Ballwanz v. Isthmian Lines, Inc., 319 F.2d 457 (4th Cir. 1963), cert. denied, 376 U.S. 970 (1964), and it there constituted grounds for reversal. The Court described the error in the following terms:

"This emphasis of the 'negative' aspects of the duty by its use of the terms 'reasonably', 'reasonable', and 'unreasonable', constantly repeated in defining the nature and extent of the duty, distorted and adulterated the character of the warranty of seaworthiness. Interspersed and repeated as they were throughout that portion of the charge devoted to defining and explaining the doctrine of liability for unseaworthiness,

> these words and phrases were tantamount to suggesting a requirement that the jury must find negligence in order to hold the ship owner liable, an obviously incorrect standard which might well have confused and misled the jury." (319 F.2d at 461) (Emphasis added).

The same kind of emphasis of the "negative" aspects of the duty laces the charge and supplemental charge herein. In discussing unseaworthiness, the Trial Court used the words "reasonable", "reasonably", "unreasonable", and "unreasonably" no fewer than 33 times (905, 907-8, 910, 913, 916-8, 968-69, 971-74). Furthermore, the Court compounded the error by instructing the jury that the "key word...is reasonable" (907), and in later stating the following: "And I emphasize reasonably...." (972). The "negative" aspects came in for doubled emphasis when the Court employed the terms "unreasonably unsafe" (910, 918), "unreasonably insecure" (913, 971), "unreasonably dangerous" (916, 973), and "risky" (973). The Court appeared to recognize the improper emphasis it was imparting to the jury, but thought that it was inevitable: "And I am using a lot of negatives because the burden of proof makes it shape up that way...." (973). But the teaching of DeLima and Ballwanz is to the contrary.

A further error of considerable proportion was committed in the main charge when the Court instructed as follows:

"But if you find that plaintiff has proved that the container on which he was standing did in fact move and that such movement would have been prevented by different lashings or stacking plates, then you must still consider whether plaintiff has proved that the absence of lashings and stacking plates at the time in question was an unseaworthy condition." (914) (Emphasis added).

This statment simply does not comport with the law. Plaintiff's counsel pointed this out to the Trial Court in his exception:

"I respectfully except from the Court's charge that if the jury finds that the container Picinich was standing on moved for lack of the restraining or stacking device, that they would still have to go on to find that the failure to use the stacking device constituted some kind of unreasonable failure." (934).

What the Trial Court did, in effect, was to impose a double burden of proof upon the plaintiff - the plaintiff not only had to prove that the container movement constituted unseaworthiness, he had to go on to show that the cause of such unseaworthy movement was also unseaworthiness. At least since Van Carpals, cited above, the law in this Circuit and elsewhere has not imposed such a burden upon the maritime plaintiff. In Oliveras v. American Export Isbrandtsen Lines, Inc., 431 F.2d 814 (2d Cir. 1970), the plaintiff was injured when a door to the wheelhouse, secured with a wedge and a hook, slid shut and slammed against the plaintiff's hand. As this

Court put it:

> "Nothing more need be shown except that the device in question failed under conditions when it should have functioned properly. On the issue of the ship's unseaworthiness it is of no moment to speculate as to why the hook and wedge, fittings intended to keep the sliding door open, failed to function. Gibbs v. Kiesel, 382 F.2d 917 (5 Cir. 1967); Van Carpals v. The S.S. American Harvester, supra; Vega v. The Malula, 291 F.2d 415 (5 Cir. 1961)." (431 F.2d at 816) (Emphasis added).

To the same effect are Greene v. Vantage Steamship Corporation, 466 F.2d 159, 163 (4th Cir. 1972), Gibbs v. Kiesel, 382 F.2d 917, 919 (5th Cir. 1967), and Case v. B.J. McDuffie, Inc., 502 F.2d 969, 970 (5th Cir. 1974).

The Court's charge in this respect was especially prejudicial because defendant's counsel had emphasized, in summation, plaintiff's so-called failure to provide a "reason" for the movement of the container (831-33).

In its supplemental charge, the Trial Court also betrayed a further misunderstanding of the nature of unseaworthiness:

> "That, I believe, summarizes the claims of unseaworthiness that are before you for consideration. I excluded from your consideration any momentary acts of a winch operator because it is a momentary thing rather than something lasting for a few hours, something like that." (972) (Emphasis added).

It is fundamental that the lapse of time plays no role in giving rise to a condition of unseaworthiness. This

was definitively established in this Circuit some time ago in the landmark case of Puddu v. Royal Netherlands Steamship Company, 303 F.2d 752 (2d Cir. 1962), cert. denied, 371 U.S. 840. The concurring opinion of Judge Hays is especially instructive:

> "Time is obviously irrelevant since notice to the shipowner is of consequence only if his liability is limited by fault. See Mitchell v. Trawler Racer, Inc., 362 U.S. 539, 80 S.Ct. 926, 4 L.Ed. 941 (1960).
>
> * * *
>
> "A ship is not unseaworthy because it has glass in a window which might be broken. The injuries of a seaman who negligently breaks such a glass are not the result of unseaworthiness, nor are the injuries of a seaman who is cut by the falling glass. But injury incurred in stepping on the broken glass does result from unseaworthiness." (303 F.2d at 757) (Emphasis added).

In this regard, it is important to remember the teaching of DeLima which holds that the error is not cured because "other parts of the charge stated the law correctly." (302 F.2d at 587). The errors detailed above were, we submit, plain and prejudicial. Furthermore, the burden rests upon the defendant on this appeal to demonstrate that such errors were not prejudicial to the plaintiff. McCandless v. United States, 298 U.S. 342, 347-48 (1936).

Point II

THE ERRORS IN THE MAIN CHARGE WERE SERIOUSLY COMPOUNDED BY THE SUPPLEMENTAL CHARGE.

Plaintiff has contended above that the main charge herein grievously blurred the vital distinction between negligence and unseaworthiness. The best proof of this was provided by the jury's own response. After approximately one hour of deliberation, the Court received the following note signed by the foreman:

> "Could we have a clarification of unseaworthiness and negligence as they apply to this case? We believe that if defendant is not unseaworthy, he is, ergo, not negligent and conversely, if defendant is negligent he is also by definition unseaworthy." (948).

Plaintiff's counsel pointed out that this note was reflective of the errors in the main charge (948), and felt that what the jury required was a "clarification of the distinction between the absolute nature of the unseaworthiness liability...and that it does not depend on negligence doctrines at all." (957).

But rather than focus upon that broad problem, the Trial Court fixated on the narrow question of whether there could be negligence without unseaworthiness (954). Plaintiff's counsel pointed out that the logic of the inquiry should not end the inquiry, because juries have historically found negligence in many cases where they failed to find unseaworthiness.

Even though such a result "doesn't necessarily commend itself to our rationale", it may be due to the "digestibility of the terms",and, in any event, plaintiff's counsel noted that the province of the jury should not be invaded by a directive that a finding of negligence requires a finding of unseaworthiness (965-66). In light of this, plaintiff's counsel contended that the only proper response was to emphasize the distinction between the two concepts (967).

The remarks of plaintiff's counsel, we submit, reflected a correct perception of the law. On the other hand, defendant's counsel did little to enlighten the Court, and, one would have expected more (notwithstanding the demands of advocacy) inasmuch as he had recently argued the case of Ianuzzi v. South African Marine Corporation, Ltd., 510 F.2d 950 (2d Cir. 1975). In that case, the widow of a longshoreman brought an action based on negligence and unseaworthiness. At the conclusion of the evidence, the Court below dismissed the negligence claim for failure of proof but submitted the unseaworthiness claim to the jury, which found for the defendant.

Plaintiff appealed from the dismissal of the negligence claim. Plaintiff had alleged that her decedent had been killed by a defective ship's winch. In light of this, defendant's counsel argued that a finding of negligence would have been impossible in light of the finding on the unseaworthiness claim

(510 F.2d at 955).. This Honorable Court disagreed:

> "[W]e have also indicated our reluctance to require strict logical niceties in the functioning of the jury in our trial system. Henry v. A/S Ocean, 512 F.2d 401, at 405-406 (2d Cir. 1975). While it may be difficult for a lawyer or a judge 'to imagine, especially on the facts of this case, how an owner could be negligent, if the ship was not unseaworthy,' Spano, supra, 472 F.2d at 35 n. 1, we hesitate to confine the imagination of the jury within such narrow bounds. The jury may very well have a 'right to an idiosyncratic position'." Malm v. United States Lines, 269 F.Supp.731 (S.D.N.Y.), aff'd on opinion below, 378 F.2d 941 (2d Cir. 1967) (per curiam), and we would not deprive it of that right here." (510 F.2d at 955) (Emphasis added).

The Trial Court Invades The Province of the Jury.

On the authority of Ianuzzi, and similar cases, we submit that a proper response to the jury note would have been a concise instruction, sharply delineating the distinction between negligence and unseaworthiness, and emphasizing the absolute nature of the latter. However, the Trial Court would not admit of the possibility that the defendant could have been negligent and not unseaworthy (955, 964). But the Court was being overly nice in its analysis. The truth is that juries sometimes do not understand unseaworthiness, and more easily conclude that negligence exists. This may boggle the minds of impeccable jurists, but the fallibility of jury

logic should not be allowed to work to the plaintiff's detriment. The plaintiff herein should have had the negligence remedy available as an alternative to unseaworthiness.

A case in point is Miller v. Royal Netherlands Steamship Company, 508 F.2d 1103 (5th Cir. 1975). The facts were similar to those here at issue. The plaintiff longshoreman was injured in the hold of the vessel, during a loading operation, when cargo fell down upon him. He contended, among other things, that the accident was caused by a listing of the vessel due to improper distribution of oncoming cargo by the ship's crew (508 F.2d at 1105). The jury found that negligence proximately contributed to the plaintiff's injuries, but that unseaworthiness did not (508 F.2d at 1107). Defendant appealed on the grounds that the jury's answers to special questions were fatally inconsistent. The Court of Appeals disagreed, holding as follows:

> "The district court's lengthy instructions contained an explanation of the difference between negligence and unseaworthiness and cautioned the jury that if they found both negligence and unseaworthiness, the plaintiff could still recover only for one. Reason confirms that the jury could have found negligence on the part of the shipowner in creating and failing to correct the list (since it was a finding which the evidence clearly would permit) but, mindful of the court's instruction, simply did not pause to further consider whether the list also constituted an unseaworthy condition." (508 F.2d at 1107) (Emphasis added).

We submit that it was entirely improper for the Trial Court to provide a specific answer to the jury's question. The Court became so enmeshed in its jurisprudential puzzle that it did not perceive, in the broader sense, what the jury was asking for. The note requested a "clarification of unseaworthiness and negligence as they apply to this case" (948). What is this besides a request to apply the law to the facts? That is peculiarly the function of the jury. The jury should have been told that they must answer their own question based upon the instructions as given.

But the Trial Court did not exercise this restraint. Instead, a supplemental charge was rendered which, among other things, informed the jury that they were "correct" in their belief that a finding of negligence would also entail a finding of unseaworthiness (973). In so doing, the Trial Court invaded the province of the jury to the detriment of the plaintiff, and in clear violation of the Seventh Amendment to the Constitution and Rule 39(a) of the FRCP.

Furthermore, there was evidence in the record which would have permitted the jury to logically find negligence in the absence of unseaworthiness. As plaintiff's counsel pointed out to the Court (964-65), the claim had been made that the defendant was negligent in failing to supervise the unloading

operation (15-16). The Court's recollection was that no evidence had been introduced on this point, but it was forgetting Captain Ash's testimony that "There should be an officer there to see that the operation proceeds safely." (237-38).

Under the circumstances, the jury was certainly entitled to find that the defendant was negligent in failing to supervise, but that this failure did not rise to the dignity of a "condition" so as to constitute unseaworthiness. It was precisely this reasoning which led this Honorable Court to affirm a jury finding of shipowner negligence without unseaworthiness in a recent longshoreman's case. Conceicao v. New Jersey Export Mar. Carpenters, Inc., 508 F.2d 437, 442 (2d Cir. 1974), cert. denied, 421 U.S. 949 (1975). And a finding of negligent lack of supervision with no unseaworthiness was all the more possible in the instant case because, in its main charge, the Trial Court undertook to catalog all of plaintiff's claims of unseaworthiness, specifically omitting any claim of lack of supervision (910-11). Henry v. A/S Ocean, 512 F.2d 401, 405 (2d Cir. 1975). Thus, if any specific response should have been provided to the jury note, it should have informed them that they were incorrect in their belief and that negligence could exist without unseaworthiness.

The Gratuitous Error

We have already set forth above what we submit would have been the correct response to the jury's note. The Trial Court, however, was determined to tell the jury that negligence equals unseaworthiness, and vice-versa. This it did in a supplemental charge (973), and thereby committed error in assuming the role of fact finder.

But worst of all, the Trial Court did not stop with a specific response to the jury's question. The most egregious error in the supplemental charge was gratuitously injected by the Trial Court without warning. In response to no particular query by the jury, the Court volunteered the following:

> "Now, if you found that the shipowner was not negligent in that - and this is the only way you could find the shipowner not negligent - if you found the shipowner was not negligent or if you found that the plaintiff hadn't proved negligence, what that would mean is that you hadn't found that the plaintiff had proved that the shipowner had created and permitted an unreasonable and unfit condition. If he didn't do that there is no seaworthiness." [Reporter error - should read "unseaworthiness"] (973-74) (Emphasis added).

Plaintiff's counsel was shocked and immediately expressed his dismay in a robing room conference:

> "There is a third question which was not asked but created and answered by your Honor on the bench without any discussion

with us. May he be yes, unseaworthy, and still not negligent? And your Honor told the jury not so. If he is yes, unseaworthy he must be negligent. Therefore, if he is not negligent, he is not unseaworthy. Indeed you not only left that by implication, you said that. Judge, that is dead wrong. I can't believe you even intended to do it. Did you intend to do that?

The Court: "I absolutely did." (975).

The damage was done, and irreparably so. Twenty minutes after the supplemental charge was delivered, the defendant's verdict was in. In this regard, it is important to note that an error in a supplemental charge is especially prejudicial because of the jury's inevitable focus upon it. Norfleet v. Isthmian Lines, Inc., 355 F.2d 359, 362 (2d Cir. 1966).

Now the first thing the defendant will say in this regard is that, on the facts of this particular case, no negligence equals no unseaworthiness. As will be pointed out below, not only is this wrong, but the peculiar facts of this case made it especially important to preserve the distinction between negligence and the absolute liability of unseaworthiness.

However, even if logic compelled the conclusion that, indeed, it was impossible to have unseaworthiness without negligence in this case, the plaintiff had an absolute right to have

both species of liability presented to the jury as distinct remedies. Here, no less than with respect to the possibility of negligence without unseaworthiness (discussed above), the jury had a right to an "idiosyncratic position". Ianuzzi, 510 F.2d at 955. By instructing the jury that, on the facts of this case, they could not find unseaworthiness without negligence, the Trial Court was again usurping the jury's role of applying the law to the facts.

Plaintiff's absolute right to have his unseaworthiness remedy presented to the jury, distinct from negligence, is guaranteed by Waldron v. Moore-McCormack Lines, Inc., 386 U.S. 724 (1967). There the plaintiff was injured when a ship's officer allegedly assigned too few crewmen to put out a heavy mooring line. The District Court granted a directed verdict for the shipowner on the issue of unseaworthiness, and the jury found for the shipowner on negligence. Notwithstanding the reasoning of the dissent that "On the facts of this case I think the claim of negligence was identical with the claim of unseaworthiness" (386 U.S. at 729-30), the five members of the majority reversed and remanded, holding that "Petitioner is entitled to present his theory of unseaworthiness to the jury. . . ." (386 U.S. at 729).

A similar case is Hussein v. Isthmian Lines, Inc., 405 F.2d 946 (5th Cir. 1968). The plaintiff had been injured

in a fall from a ladder. The trial judge refused to charge on unseaworthiness, reasoning in much the same fashion as the Trial Court herein, to wit:

> "'[H]e thought this was a case for negligence predominantly, right or wrong, and with unseaworthiness, we would just be confusing the jury, because it would involve about the same ground.'" (405 F.2d at 947) (Emphasis added).

The jury found for the defendant on negligence. The Court of Appeals reversed and remanded on the following grounds:

> "Since the record contains evidence from which the jury could have found that the appellant was required to work on a greasy ladder and was not furnished the proper equipment to do the job assigned to him, the erroneous refusal to give the requested charge was prejudicial. Waldron v. Moore-McCormack Lines, Inc., 386 U.S. 724, 87 S.Ct.1410, 18 L.Ed.2d 482 (1967)." (405 F.2d at 947).

It is submitted that the Trial Court herein committed the same error dealt with in both Waldron and Hussein - by instructing the jury that there could be no unseaworthiness herein without negligence, the Trial Court, in effect, removed the issue of unseaworthiness from the jury's consideration.

Unseaworthiness Without Negligence

In any event, what is most important to point out about this case is that, on the facts, it is an especially appropriate candidate for a finding of unseaworthiness without negligence. The jury could have concluded that the movement of the container was due to a lack of stacking devices, a lack of deck fittings, or a lack of individual lashings, and was precipitated by swell from a passing vessel, listing of the ship, contact with the adjacent container, or any combination of these factors. However, the jury could also have found that the non-use of stacking devices, deck fittings, or individual lashings was consistent with customary, safe, and seamanlike practice. The defendant introduced considerable evidence on this score. For example, Captain Wheeler testified that the method of stowage employed aboard the CONCORDIA VIKING was "a good and proper and seamanlike way to transport these containers." (717). Defendant's counsel argued in summation:

> "Our contention is that we were not negligent in contributing to this accident, that we did not do anything that we should not have done, and we contend there was nothing wrong with our equipment and nothing wrong with the stowage and nothing wrong with the lashing which we provided." (839).

Thus, the jury was entitled to conclude that all of the actions of the defendant were consistent with the standard

of reasonable care. And yet, they could also have found that, under the circumstances prevailing on the day of the accident, the stowage of the containers did not result in a properly safe working surface for Anton Picinich.

The point is that reasonable care to produce safety is not synonymous with reasonable safety. The former describes activity and the latter describes the end product. The jury here might well have perceived differences between the two standards, and they were entitled to.

We submit that the Trial Court possessed a narrow view of the distinction between unseaworthiness and negligence and that this, at least in part, is responsible for its error in merging the two concepts. Several portions of the main charge and the supplemental charge reflect the notion that the only difference between negligence and unseaworthiness is that, with respect to the latter, liability attaches without notice of the defect. When the Court provided examples of unseaworthiness they always involved latent defects of which the shipowner could have no notice (907, 969-70). This preoccupation with the element of notice was finally expressed in unequivocal terms late in the supplemental charge, when the Court said:

> "If you find the plaintiff has proved that the situation was not reasonably fit, in the terms that I discussed with you, then I believe obviously, that would be unseaworthy and it would also be negligent. Why? Because the shipowner knew about that situation and created it." (973).

What the Trial Court omitted from its analysis is the situation wherein the shipowner has actual (or constructive) notice of the risk but is not negligent because he has exercised reasonable care in order to eliminate that risk. In spite of that reasonable care, however, the requisite safety may not be achieved and unseaworthiness results. Plaintiff's counsel drew the Court's attention to the fact that just such an analysis might be appropriate in the instant case:

> "My point is that the jury could under the facts of this case find that the box was not reasonably secure, i.e., an unseaworthy condition, but reasonable past custom and practice had been followed in creating the condition even though the shipowner knew of it. They could so find." (976) (Emphasis added).

But the Trial Court was not impressed (976). And that was especially unfortunate in this case, which was such an obvious candidate for a finding of unseaworthiness without negligence. As mentioned above, the main thrust of the shipowner's defense was to the effect that it had followed the customary and usual practice with regard to stowage of containers on a dry cargo ship. Defendant's counsel pushed this point with almost every witness, both on direct and cross. The plaintiff was asked to admit that the CONCORDIA VIKING was a dry cargo ship and not a container ship, which he did (62). Captain Ash conceded that the CONCORDIA VIKING was not designed as a container ship (264), and that he had served on

dry cargo vessels which did not carry stacking devices (411). Morich testified that most dry cargo ships have no deck fittings for containers (138-39). And Captain Wheeler said that stacking devices are used on container ships, but not on dry cargo ships (759).

As also set forth above on page 16, Chief Mate Vangsnes testified that the use of dunnage between the container tiers instead of stacking devices "is the way it's done on all cargo ships which don't have these [stacking] devices on board." (603). The best example of defendant's strategy to establish a standard of care applicable to dry cargo vessels occurred during the cross-examination of Captain Ash (254-66). Defendant's counsel referred to Captain Ash's recommended method of individually lashing the containers (254), and asked him if that method could be employed along with stacking devices between the tiers (256). Captain Ash replied that it was done by utilizing a unit with a hook attached (256), and agreed that he was referring to gear of pre-determined size called Peck & Hale gear (257). Captain Ash further agreed that such Peck & Hale gear was used on container vessels with pre-determined fittings and distances (263-64). Defense counsel then concluded his line of inquiry with the following questions and answers:

> "Q. You are not answering my question. Listen to my question. I say on the average dry cargo ship that carries containers on occasions, that is not devoted to the carriage

of containers, do the deck fittings lend themselves - when I say deck fittings I mean padeyes and other fittings on deck, staples; you know what that is?

"A. Yes.

* * *

"Q. Do those locations on the deck of a dry cargo ship lend themselves to pre-measured, pre-determined lengths of lashings for containers which may be 20 feet, 35 feet, 40 feet?

"A. There are limitations." (265-66) (Emphasis added).

Of course, defendant's argument was that the CONCORDIA VIKING did not "regularly carry containers" (171), and was not obligated to employ the devices utilized on container vessels, because, as Captain Wheeler claimed, "Container ships are limited to the carriage of full and empty containers." (759). As noted above, plaintiff's response was that a vessel carrying containers, certainly one carrying 76 at a time, should be rigged as a container vessel whether or not it was designed as a dry cargo ship (396-97). If considerable expense was required to make necessary modifications, then this was simply the cost imposed by the doctrine of unseaworthiness, which mandates that that cost not be borne by the injured maritime worker but be distributed by the shipowner in the industrial community. Seas Shipping Co. v. Sieracki, 328 U.S. 85, 93-96 (1945).

But the jury might well have believed that the standard of reasonable care was considerably less demanding than the absolute standard of Sieracki. Indeed, defendant's attorney counted on this and, in summation, denigrated Captain Ash's plans to "substantially modify the deck of the ship" (840). It is precisely this sort of case, where the shipowner defends on the basis that plaintiff's proposed standards are a "unreasonable burden on the industry", which requires a strong charge informing the jury that compliance with reasonable custom and practice will not exonerate the shipowner. Here, exactly the opposite was done, and the jury was told that reasonable care equalled seaworthiness.

The authority is certainly plentiful which holds that customary and non-negligent practice will not always produce seaworthiness. Perhaps the case most directly in point is Rodriguez v. Coastal Ship Corporation, 210 F.Supp.38 (S.D.N.Y. 1962). The plaintiff therein, a longshoreman, sued both under negligence and under unseaworthiness for injuries sustained when he slipped in oil on the deck of defendant's vessel. The vessel was a container ship, innovative at the time, "designed to achieve maximum efficiency in loading and unloading of entire trailer bodies." (210 F.Supp. at 40). The operation of a particular crane on the vessel resulted in a dripping of oil to the deck. Defendant's proof demonstrated that, by reason of

the vessel's "unique design", "some oil spillage onto the deck and pontoons is inevitable and is impossible to prevent." (210 F.Supp. at 42).

Judge Weinfeld conceded the defendant its proof, made no finding of negligence, but held as follows:

> "The ultimate question is - was she reasonably fit to permit libelant to perform his task with reasonable safety. The fact that the oil spillage problem on container ships has not been resolved, or even that perhaps it cannot readily be solved, does not conclude the trier of the fact on the issue of the Gateway City's seaworthiness. What an industry does or fails to do, while it may have some evidential value, does not establish or diminish the measure of legal duty - an absolute one to supply a seaworthy vessel." (210 F.Supp. at 43) (Emphasis added).

Also in point is In Re Read's Petition, 224 F.Supp. 241 (S.D.Fla. 1963), where the plaintiff was injured by the shipowner's winch and claimed both negligence and unseaworthiness. The winch was not defective, and malfunctioned only because of a "fortuitous combination of wind, water and movement of the vessel" (224 F.Supp. at 247). The Court found that the winch was "in capabilities, design and efficiency, the best available" and specifically held the shipowner to be free of negligence (224 F.Supp. at 248). But because the winch failed in its intended use the vessel was unseaworthy (224 F.Supp. at 249). In the same fashion, the container aboard the CONCORDIA

VIKING failed in its intended use as a working surface, even if it were conceded to have been stowed in the best possible fashion aboard a dry cargo vessel.

There are many cases which stand for the proposition that compliance with good industry practice does not produce seaworthiness, regardless of its bearing on negligence standards, for example, Tucker v. Calmar Steamship Corporation, 457 F.2d 440, 446 (4th Cir. 1972); Burns v. Anchor-Wate Co., 469 F.2d 730, 734-35 (5th Cir. 1972); and Morris v. Fidelity & Casualty Company of New York, 321 F.Supp. 320, 324 (E.D.La. 1970), aff'd, 441 F.2d 1146 (5th Cir. 1971).

Alternatively, the jury in the instant case might have concluded that the container in question did, in fact, move while the plaintiff was on it and, in addition, might have concluded that they were unable to ascertain the precipitating cause thereof except to say that it was not solely due to any isolated act of third party negligence or any contributory negligence. If the jury were unable to ascertain this cause, a fortiori, they would have been unable to ascertain whether the cause was reasonably foreseeable by defendant. And without this element of foreseeability, a determination of negligence could not be made.

Nonetheless, if the fact of movement had been proved the jury was entitled to conclude that this, standing alone,

rendered the container unsafe for its assigned task as a working surface. Unseaworthiness would thereby be established. In contrast to the requirements for finding negligence, it would not be necessary for the jury to make any determination as to the cause of the movement or its foreseeability. Oliveras v. American Export Isbrandtsen Lines, Inc., 431 F.2d 814, 816 (2d Cir. 1970); Van Carpals v. The S.S. American Harvester, 297 F.2d 9, 11 (2d Cir. 1961), cert. denied, 369 U.S. 865 (1962).

The jury was certainly entitled to conclude that the fact of movement alone constituted unseaworthiness. Clearly the container's use as a working surface was one of its "assigned tasks", inasmuch as the ship's crew had left the lashings on top and the Chief Mate had seen longshoremen work on top of containers "many times" (654).

The general rule here applicable was well laid out in Marshall v. Ove Skou Rederi A/S, 378 F.2d 193 (5th Cir. 1967), cert. denied, 389 U.S. 828. There the plaintiff longshoreman was injured when a steel beam fell from the ship's cargo sling. There was no evidence that the equipment was defective, no evidence of negligence, and no evidence of the operation of external forces (378 F.2d at 195). Nevertheless, there was unseaworthiness. The Court's analysis was simple:

"The winch was operated properly. The load struck nothing. The sling did not break. No new agency affected the sling. The loading operation was done without negligence. The sling simply did not perform its single assigned purpose of retaining the load without dropping it while moving it from point A to point B." (378 F.2d at 198) (Emphasis added).

A case which is on all fours with the present fact situation is Venable v. A/S Det Forenede Dampskibsselskab, 399 F.2d 347 (4th Cir. 1968). The plaintiff longshoreman therein had sustained injuries in a fall from the surface of a hogshead stowed on defendant's vessel. Plaintiff appealed from a verdict for the shipowner, alleging an error in the charge relating to unseaworthiness. The Court of Appeals reversed and remanded, setting forth the issue on unseaworthiness in plain terms:

"Certainly the shipowner was cognizant of the fact that longshoremen would be forced, during loading and unloading operations, to work on the stowed hogsheads. It therefore became his absolute duty to make the surface safe for that type of work. . . . While the defendant's testimony was that it was not the industry practice to use dunnage in this particular type of stowage, this is no sufficient answer. As we have had occasion to comment before, '[w]e fail to perceive any logical reason why trade customs should be permitted to form the legal standard of seaworthiness in actions under maritime law.' Bryant v. Partenreederei Ernest Russ, 330 F.2d 185, 189 (4th Cir. 1964). The duty of the shipowner is to assure a reasonably safe ship for all who work on board. This obligation is not satisfied by a showing that he has exercised reasonable care or due diligence, see Sieracki, supra, 328 U.S. at 104, 66 S.Ct. 872; Mahnich, supra, 321 U.S. at 100, 64 S.Ct. 455, or that he has complied

with industry practice which may be guided by economy in disregard of the men's safety.

* * *

"The question for the jury is simply whether the stowage on the Oklahoma was safe for its intended use as a working surface for men engaged in the loading or unloading of heavy hogsheads." (399 F.2d at 352-53) (Emphasis added).

Other cases wherein unseaworthiness arose out of the failure of a working surface without the demonstration of a cause are Rich v. Ellerman & Bucknall S.S. Co., 278 F.2d 704, 706 (2d Cir. 1960) and Greene v. Vantage Steamship Corporation, 466 F.2d 159, 163 (4th Cir. 1972). See also, Case v. D.J. McDuffie, Inc., 502 F.2d 969, 970 (5th Cir. 1974); Nitkowski v. Prudential-Grace Line, Inc., 469 F.2d 93 (9th Cir. 1972); Gibbs v. Kiesel, 382 F.2d 917, 919 (5th Cir. 1967); and Reddick v. McAllister Lighterage Line, 258 F.2d 297, 299 (2d Cir. 1958), cert. denied, 358 U.S. 908.

It is submitted that the Trial Court did not focus upon this brand of unseaworthiness, which arises without negligence, because it felt that plaintiff's burden went beyond a demonstration of the failure of his working surface. As pointed out above on page 26, the Court felt that it was further incumbent upon the plaintiff to prove that the working surface failed by reason of an unseaworthy lack of lashings and stacking devices (914). This imposed an impermissible double burden upon the

plaintiff.

There were other ways in which the jury could have found no negligence and yet unseaworthiness. For example, they could have concluded on the evidence that the stowage had been accomplished with all reasonable care and the movement of Picinich's container was precipitated by contact with the adjacent container. Captain Ash certainly testified as to this possibility (245, 404, 416-17, 425). The jury could also have felt, as Captain Ash did, that such contact was unavoidable (245, 400-403, 416), and not due to any third party negligence. In addition Captain Wheeler had testified that such contact could not have set Picinich's container in motion (736). The jury could have chosen to believe Captain Ash, and taken account of Captain Wheeler's testimony by concluding that if movement was not foreseeable by defendant's expert, it was certainly not foreseeable by defendant's officers and crew.

On this analysis, the jury would have reasoned that movement did occur because of contact not foreseeable in the exercise of reasonable care and, therefore, not due to shipowner negligence. Nonetheless, such contact produced a moving platform that became a terribly unsafe and unseaworthy surface for Anton Picinich at the time he was renderring his maritime service to the vessel. Thus, again we would have unseaworthiness

on the authority of Venable, Van Carpals, Oliveras, and the other cases cited above. Yet there would be no negligence.

As a variant on this possibility, the jury might have concluded that the contact was reasonably foreseeable, but did not constitute enough of a risk to warrant further measures in the name of due care. Prosser, Law of Torts Section 30 (2d Ed. 1955). Thus, again we would have no negligence under the circumstances, and yet a permissible finding on the cases cited above that the stowage was not properly safe, and therefore unseaworthy, on the day in question.

Based upon all of the above analysis, plaintiff respectfully submits that the Trial Court committed an error of major proportions when it gratuitously informed the jury that it could not find unseaworthiness without negligence. In so doing, the Court not only reached an erroneous conclusion, but did so by applying the law to the facts and thus usurped the private function of the jury, in violation of plaintiff's constitutional rights and Rule 39(a) of the FRCP.

Point III

THE TRIAL COURT COMMITTED ERROR IN FAILING TO CHARGE THE JURY THAT UNSEAWORTHINESS ARISES FROM THE EXISTENCE OF AN IMPROPER METHOD OF UNLOADING CARGO.

Throughout the trial, the plaintiff claimed that the CONCORDIA VIKING was unseaworthy because the gang boss Santoro had implemented an improper method of discharging the containers. Plaintiff's counsel devoted a considerable portion of his summation to this claim (871-73), and commended the jury to the Trial Court's charge on this form of unseaworthiness (873). This proved to be futile because no such charge was forthcoming.

The facts underlying this claim are simple. Santoro instructed four members of his gang, including the plaintiff, to discharge the containers on the port and offshore side of hatch number five (34, 124-25). The plaintiff and his partner climbed to the top of the inshore aft top container (36) in order to perform their "duty" to place four hooks from the ship's boom on the container so that it could be lifted up and out (37). After the hooks were attached, Santoro instructed them to step to the adjacent offshore containers and throw off some loose lashings that remained there (41).

The stevedore's Injury Report (Exhibit 8) stated

that the longshoreman operating the ship's boom began to lift the hooked-up container "under supervision of the hatch boss" (1N). At this time, the plaintiff and his co-worker were engaged in throwing off the loose lines (43), and plaintiff was then suddenly hurtled into the water. There was general agreement that some contact had occurred between the inshore container and the offshore container during the lifting process (93, 435, Exhibit 8).

The nature of the improper method of unloading is perfectly explained by the Injury Report:

> "All foremen and hatch bosses have been instructed that no cargo operation shall start until all lashings on all deck cargo in vicinity have been removed." (10).

In addition, Captain Ash testified that the lifting off of a container while a man was standing on an adjacent container, "without the stacking devices and with loose deck lashings up on the top", constituted an "unsafe working condition" (245-46). Captain Wheeler even admitted that it was unsafe for the plaintiff to have been positioned on the offshore container at the time (778), and, of course, the defendant cannot claim contributory negligence in this regard because the plaintiff had been ordered to go upon that container to remove lashings (41, 408). (See also 201-202).

If the jury believed that the plaintiff's 35 foot

plunge was precipitated by contact with the lifting container, they were entitled to consider whether his injuries had been brought about by an improper method of discharging cargo. But the Trial Court's charge had nothing to say with respect to this well-established form of unseaworthiness. This failure to charge was exacerbated by the fact that the Court purported to set forth all of plaintiff's claims in its main charge (910-11) and in its supplemental charge (971-72).

Plaintiff's counsel promptly excepted to the Court's ommission (933). Even the defendant's counsel, in a commendable moment of candor, admitted that unseaworthiness could arise under the circumstances:

> "I can conceive with the facts in this case of a situation where you have unseaworthiness resulting from negligence other than the shipowner's negligence." (949).

But the Trial Court was of the opinion that the improper method of discharge could not give rise to unseaworthiness because of Usner v. Luckenbach Overseas Corp., 400 U.S. 494 (1971). Plaintiff's counsel argued in some detail that Usner was not applicable:

> "If he was up on the box at the time the hatch boss decided to lift off the inboard container, he's up on the outboard container to remove lashings. If the hatch boss should not have instructed the winchman and the other men to go ahead with the lift-off while he was on top of the box, then that method of proceeding, that is not a momentary act. That takes a few minutes. That is a

> procedure. If the hatch boss should not have gone forward at that time with him still up there, it is not Usner. It is an unsafe method of operation, and he is entitled to recover even though it is the act and selection of procedure of stevedores." (942).

However, the Court would not be swayed (946).

It is respectfully submitted that the plaintiff's view of the law was correct and that a charge in this regard should have been rendered. The law is well-settled. One can start with the basic proposition that the duty to supply a seaworthy vessel is non-delegable. Alaska S.S. Co., Inc. v. Petterson, 347 U.S. 396 (1954). Furthermore, it matters not that the relevant equipment is non-defective, as long as the manner in which it is utilized is improper. Crumady v. The J. H. Fisser, 358 U.S. 423 (1959). And the fact that the resulting unseaworthiness is transitory is likewise of no import. Mitchell v. Trawler Racer, Inc., 362 U.S. 539 (1960).

It has long been held that an improper method of operation on a vessel gives rise to unseaworthiness. It makes no difference that the procedure involved was adopted by the longshoremen themselves. Succinctly put, it matters only that there be in existence a method, manner, plan, technique or procedure, faulty in its conception or implementation, pursuant to which the individual longshoremen perform their individual acts. Unseaworthiness is then the result. Judge Learned Hand's

oft-cited decision in Grillea v. United States, 232 F.2d 919 (2d Cir. 1956) supplied the rationale for this rule:

> "It may appear strange that a longshoreman, who has the status of a seaman, should be allowed to recover because of unfitness of the ship arising from his own conduct in whole or in part. However, there is in this nothing inconsistent with the nature of the liability because it is imposed regardless of fault; to the prescribed extent the owner is an insurer, though he may have no means of learning of, or correcting, the defect. . . . The following passage from Seas Shipping Co. v. Sieracki, 328 U.S. 85, 94, 66 S.Ct. 872, 877, 1 L.Ed. 1099, expresses the considerations that lie behind it. The owner
>
> > 'is in position, as the worker is not, to distribute the loss in the shipping community which receives the service and should bear its cost.
> >
> > 'These and other considerations arising from the hazards which maritime service places on men who perform it, rather than any consensual basis of responsibility, have been the paramount influences dictating the shipowner's liability for unseaworthiness as well as its absolute character. It is essentially a species of liability without fault, analogous to other well known instances in our law. * * * It is a form of absolute duty owing to all within the range of its humanitarian policy.'"
>
> (232 F.2d at 923) (Emphasis added).

In Scott v. Isbrandtsen Company, 327 F.2d 113 (4th Cir. 1964), the jury had returned a verdict for the defendant after the Trial Court charged that they must do so if they found that the stevedore's "method of operation" was the "sole proximate cause" of the accident (327 F.2d at 117, fn. 2).

The Court of Appeals found evidence of an unsafe method of operation utilized by the longshoremen (327 F.2d at 124), and citing Grillea, Mitchell v. Trawler Racer, Inc. (cited above), and Holley v. The Manfred Stansfield, 269 F.2d 317 (4th Cir. 1959), the Court reversed and remanded on the grounds that the "method of operation" presented a factual issue as to unseaworthiness (327 F.2d at 125-26).

The cases supporting what has become known as the "Grillea Doctrine" go on and on, and we will cite but a few of the leading ones to make the point: Ferrante v. Swedish American Lines, 331 F.2d 571, 578 (3rd Cir. 1964), cert. dismissed, 319 U.S. 801; Cleary v. United States Lines Company, 411 F.2d 1009, 1010 (2d Cir. 1969); and Robillard v. A. L. Burbank & Co., Ltd., 186 F.Supp. 193, 196 (S.D.N.Y. 1960).

Defendant will rely upon Usner v. Luckenbach Overseas Corp., 400 U.S. 494 (1971), as did the Trial Court, for the proposition that the acts of longshoremen cannot give rise to liability for unseaworthiness, but, in the instant case, that argument is unavailing. In Usner, the plaintiff-petitioner was a longshoreman assisting in the unloading of a vessel. As the Supreme Court described the facts:

"The petitioner and others were on the barge, where their job was to 'break out' the bundles of cargo by securing them to a sling attached to the fall each time it was lowered from the ship's boom by the winch operator. The loading operations had been proceeding in this manner for some time, until upon one occasion the winch operator did not lower the fall far enough. Finding the sling beyond his reach, the petitioner motioned to the flagman standing on the deck of the ship to direct the winch operator to lower the fall farther. The winch operator then lowered the fall, but he lowered it too far and too fast. The sling struck the petitioner, knocking him to the deck of the barge and causing his injuries." (400 U.S. at 495) (Emphasis added).

There was absolutely no indication in the evidence that the longshoremen had been proceeding pursuant to a faulty plan, technique or manner of operation. The Supreme Court held that the cause of the accident was simply "the isolated, personal negligent act of the petitioner's fellow longshoreman" (400 U.S. at 500) and for this there could be no liability. However, the Court was careful to distinguish those situations where improper plans or methods are utilized:

"A vessel's condition of unseaworthiness may arise from any number of circumstances. . . . The method of loading her cargo, or the manner of its stowage, might be improper." (400 U.S. at 499) (Emphasis added).

If the language of Usner is not sufficient on its face to vitiate the case as a prop for the Trial Court's position herein, then it is a simple task to set forth the post-Usner cases which will do the job. These cases have

sharply delineated the narrow range of factual situations to which the holding in Usner is applicable. One such important case in the Second Circuit is Siderewicz v. Enso-Gutzeit O/Y, 453 F.2d 1094 (1972), cert. denied, 407 U.S. 912. This case made it clear that an improper method of unloading cargo will visit liability upon the shipowner, even though it was negligent of the longshoremen to devise and implement that method. Plaintiff argued that the procedure was unsafe, and thus unseaworthy, because the ship's cargo sling was overloaded by his co-workers (453 F.2d at 1095). The Court of Appeals agreed that there was evidence that would render "the whole procedure unsafe" (453 F.2d at 1095). After first citing Usner for the proposition that unseaworthiness arises from improper loading technique (453 F.2d at 1095), the Court went on to say:

> "If putting nine bales in the draft made the vessel unseaworthy, the shipowner would not be saved from liability because it may have been negligent of the stevedoring company to use that technique. Grillea v. United States, 232 F.2d at 919, 922-23 (2d Cir. 1956); Thompson v. Calmar S.S. Corp., 331 F.2d 657, 659 (3rd Cir. 1964); see Crumady v. The Joachim Hendrik Fisser, 358 U.S. 423, 427-428, 79 S.Ct. 445, 3 L.Ed.2d 413, 427-428, 79 S.Ct. 445, 3 L.Ed.2d 413 (1959)." (453 F.2d at 1095-96, fn. 5) (Emphasis added).

To the same effect is Varlack v. Mitsui O.S.K. Lines, K.K., 333 F.Supp. 1233, 1236 (E.D.Pa. 1971).

Moreover, even where there is no improper plan or

method of operation, but the plaintiff is injured by the mere careless acts of his fellow longshoremen which do not last long enough to assume the dignity of a "course of action", liability will attach if the negligent acts have a duration in time that pre-dates the injury itself. Thus, in Kyzar v. Vale Do Ri Doce Navegacai, S.A., 464 F.2d 285 (5th Cir. 1972), cert. denied, 410 U.S. 929 (1973), the Court of Appeals distinguished Usner and laid down the following rule:

> "An act of a fellow longshoreman has only an instantaneous duration when it begins or develops, for the first time, contemporaneously with injury to the plaintiff. And - whether for sound policy reasons or not - it appears that a greater-than-instantaneous duration is what converts a single act of negligence into a condition tantamount to unseaworthiness. The condition need not exist for long enough to permit discovery by a reasonably prudent shipowner. Mitchell v. Trawler Racer, Inc., 1960, 363 U.S. 539, 80 S.Ct. 926, 4 L.Ed.2d 941. But the act must in some way have roots which can be traced back in time for more than the instant separating act and injury." (464 F.2d at 290) (Emphasis added).

Space does not permit a full description of the numerous cases which hold that Usner does not apply to the facts of the instant case. However, the following cases are merely cited as additional authority: Carey v. Lykes Brothers Steamship Company, Inc., 455 F.2d 1192, 1194-95 (5th Cir. 1972); James v. Sea-Land Service, Inc., 456 F.2d

221, 222 (5th Cir. 1972); Williams v. Shipping Corporation of India, Ltd., 354 F.Supp. 626, 630 (S.D.Ga. 1973); Garrett v. Gutzeit O/Y, 377 F.Supp. 1119, 1121 (E.D.Va. 1974); Miller v. Royal Netherlands Steamship Company, 508 F.2d 1103, 1107 (5th Cir. 1975); and Baker v. S/S Cristobal, 488 F.2d 331, 332 (5th Cir. 1974).

The Trial Court's failure to charge on the improper method of unloading became a double error. Not only was this valid claim of unseaworthiness omitted, but the viability of this claim created an additional fact situation under which unseaworthiness could arise without shipowner negligence, thus further infecting the supplemental charge wherein the jury was instructed that there could be no unseaworthiness without negligence.

Point IV

THE TRIAL COURT COMMITTED ERROR BY CHARGING ON AN ISSUE FOR WHICH THERE WAS NO EVIDENTIARY SUPPORT.

The focus of the Trial Court on Usner was so strong that it felt compelled to render the following charge:

> "Now, one thing I should caution you about again on the negligence claim. That is similar to what I alluded to earlier on the unseaworthiness claim, that is, that the shipowner is not liable for any fault or neglect on the part of a winch operator employed by the stevedoring company in the momentary handling of the winch and the container held by the boom at that moment." (921) (Emphasis added).

This charge was entirely improper on the facts of this case inasmuch as there was no evidence in the record to suggest that the winch operator was guilty of any negligence. On the contrary, Captain Ash had testified that contact between the containers during the lifting process was unavoidable (245, 416). Plaitiff's counsel immediately excepted in the following terms:

> "I object and respectfully except to the several attentions given in the charge to the concept of the winch operator's handling or negligent handling of the load, particularly on this record, in which there is literally a totality or near total absence - I think there is a total absence - of evidence that there was a negligent act by the winch operator, who is unnamed and not testified about in any direct way whatsoever. I ask the Court in that connection to advise the jury that it would be speculation in this case for the jury to find that the winch operator mishandled the load, there being no such evidence in the case." (935-36).

The error is clear. If the jury followed the Court's invitation to attribute the accident to "negligence" on the part of the winch operator, they could have exonerated the shipowner on this basis, even though there was no evidence to support it. The law is unequivocal in this respect - "the rule is that there must be substantial evidence, as distinguished from a scintilla or modicum of evidence", to justify submission of an issue to the jury. Smith v. Mill Creek Court, Inc., 457 F.2d 589, 592 (10th Cir. 1972). To the same effect is Mandel v.

Pennsylvania Railroad Company, 291 F.2d 433, 435 (2d Cir. 1961), cert. denied, 368 U.S. 938, and Jackson v. Crockarell, 475 F.2d 746, 748 (6th Cir. 1973).

A case particularly in point is Pellegrini v. Chicago Great Western Railway Company, 319 F.2d 447 (7th Cir. 1963) where the jury had been instructed that the defendant railroad was not liable for plaintiff's injuries if they were caused by improper loading on the part of the shipper. The Court of Appeals reversed and remanded, holding as follows:

> "We think this instruction also should not have been given. There is no proof that the car was improperly loaded by the shipper, in fact, no proof as to the manner of its loading. Thus, the jury was left to speculate, without proof, that the shipper rather than defendant might have been responsible for the accident resulting in plaintiff's injuries." (319 F.2d at 455) (Emphasis added).

Again, the Trial Court committed a double error. It was error enough to allow speculation on the issue of the winch operator's "negligence", especially in this case where a "battle of the experts" had left the cause of the container movement much in doubt. But, at the very least, the jury should have been further instructed that any Usner-type negligence would not exonerate the defendant if such negligence merely activated an underlying insecure situation. As this Honorable Court said in Marchese v. Moore-McCormack Lines, Inc., 525 F.2d 831 (2d Cir. 1975):

"It is true that an isolated negligent act of a fellow servant which causes an injury may not render a vessel unseaworthy. Usner v. Luckenbach Overseas Corp., 400 U.S. 494, 500 (1971). But where such a negligent act brings into play an unseaworthy condition, a shipowner will be held liable. Crumady v. The Joachiman Hendrik Fisser, 358 U.S. 423 (1959)." (525 F.2d at 834).

Directly in point is Griffin v. United States, 469 F.2d 671 (9th Cir. 1972), wherein a plaintiff longshoreman was injured by a falling object dislodged by his fellow workman. The Court of Appeals distinguished Usner and stated:

"There may be an argument about the negligence of the fellow workman who dislodged the object, but this question belongs in the indemnity phase of the case. It does not affect Griffin's claim. An unseaworthy condition that causes no damage until brought into play by the negligence of a longshoreman employed by the stevedore is nonetheless an unseaworthy condition in the workman's action against the shipowner. E.g., Alaska Steamship Co. v. Garcia, 378 F.2d 153 (9th Cir. 1967)." (469 F.2d at 672) (Emphasis added).

In the same fashion, the Trial Court's charge should have at least been tempered by an instruction in accord with the Marchese and Griffin cases.

CONCLUSION

Plaintiff is a grievously injured longshoreman. His accident occurred while he was in the service of the ship. The facts of his accident and the severity of his injuries are amptly attested to by the stevedore's own Injury Report and by

doctors retained for the defense. The plaintiff was catapulted 35 feet to the water below by a plain failure of his working surface to perform its assigned task. And yet, a defendant's verdict was returned because, we submit, of the clear errors in the Court's charge detailed above. The plaintiff deserves his day in Court with a properly instructed jury, and, in order to accomplish that, we respectfully pray that this case be reversed and remanded for a new trial.

Respectfully submitted,

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Attorney for Appellant

Service of ~~three~~ Two (2) copies of the within is admitted this day of 19

ATTORNEYS FOR DEFENDANT-APPELLEES & DEFENDANT-THIRD-PARTY PLAINTIFF-APPELLEE

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